U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 01Nov2001

In the Matter of:	:	
	:	
BILLY E. CARTER,	:	
Claimant,	:	
	:	
v.	:	**Case No.: 2000-BLA-0668**
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	
	:	

Appearances:

George W. Appleby, Esq., Des Moines, Iowa
For the Claimant

Kim Prichard Flores, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, MO
For the Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* (hereafter "the Act"[1]) filed by Billy E. Carter (hereafter "Claimant") on January 19,

[1] The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981. The pertinent amendments are discussed in 20 C.F.R. § 725.1. Recently, several of the regulations governing the Act were amended; the amendments are found at 65 Fed. Reg. 79,920 (Dec. 20, 2000) (codified at 20 C.F.R. Parts 718, 722, 725-27). Some of the amendments are not effective for certain claims pending on January 19, 2001 or for certain evidence developed prior to that date. 20 C.F.R. §§ 718.101(b), 725.2(c) (2001). For those sections, the 1999 version of the regulations will be cited. Unless otherwise indicated, citations are to the 2001 edition of the regulations.

1999. A hearing was held before the undersigned administrative law judge on October 25, 2000.[2] For reasons set forth below, the claim is **DENIED.**

STATEMENT OF THE CASE

On January 19, 1999, Claimant filed this, his first, application for black lung benefits under the Act. (DX 1.) After reviewing Claimant's evidence, a claims examiner for the U.S. Department of Labor, Employment Standards Administration, Division of Coal Mine Workers' Compensation (hereafter "DCMWC") denied the claim on January 20, 1999. (DX 13.) Specifically, the claims examiner found that Clamant's evidence did not show that Claimant worked as a coal miner.[3] (DX 13.) On March 9, 1999, the senior claims examiner advised Claimant's counsel of the basis for this decision and informed him that a thirty-day period began to run from this date for the purpose of submitting additional evidence concerning Claimant's employment. (DX 14.) Claimant took advantage of this opportunity and submitted additional evidence and argument on April 5, 1999. (DX 15.) After reconsidering Claimant's new evidence, the Acting District Director of the DCMWC held an Informal Conference with all parties where he credited Claimant with one year and nine months of qualifying coal mine employment. (DX 19.)[4] However, he ultimately denied the claim, determining that Claimant did not sufficiently show that his total disability arose from his coal mine employment. (DX 19.) Claimant then requested a formal hearing before the Office of Administrative Law Judges of the U.S. Department of Labor. (DX 20.)

The hearing was held on October 25, 2000 in Kirksville, Missouri. Claimant was the only witness to testify. At the hearing, Director's Exhibits 1 through 22 and Claimant's Exhibits A through E were admitted into evidence. Although the record was kept open for a period of thirty days to allow Claimant to respond to the report of Dr. Sandra N. Mohr (DX 22), no additional evidence was submitted. Both parties submitted post-hearing briefs, on February 5 and 13, 2001.

The matter was, however, delayed by virtue of the February 9, 2001 *Preliminary Injunction Order* issued by Judge Sullivan in *National Mining Association v. Chao*, 145 F. Supp. 2d 1 (D.D.C.

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[2] References to the Director's Exhibits 1 through 22 and Claimant's Exhibits A through E, admitted into evidence at the October 25, 2000 hearing, appear as "DX" followed by the exhibit number and "CX" followed by the exhibit letter, respectively. References to the hearing transcript (Official Report of Proceedings) appear as "Tr." followed by the page number.

[3] Claimant apparently failed the "function" prong of the three-part test, discussed in detail *infra*, used to determine if a claimant is a "miner" within the meaning of the Act. (DX 4.)

[4] Technically, the document referenced as "DX 19" was not marked/stamped when offered and admitted into the record at the hearing. However, the "List of Director's Exhibits" clearly identifies this document as DX 19 and it will be referred to as such.

2001), a case involving a challenge to new Black Lung regulations, and specifically amendments to Part 718 that generally took effect on January 19, 2001. *See, e.g.*, 20 C.F.R. § 718.101(b) (2001). Under the terms of paragraph 3 of the Order, all claims for black lung benefits pending before the Office of Administrative Law Judges were to be "stayed for the duration of the briefing, hearing and decision schedule set by the Court, except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case." On March 15, 2001, the undersigned administrative law judge issued an Order directing the parties to submit briefing concerning the effect of the new regulations. In response to that Order, briefs were submitted by the Director and the Claimant, both of whom took the position that the outcome would not be affected by the amendments to the regulations. However, the issue became moot, because on August 9, 2001, Judge Sullivan issued an opinion dissolving the stay and upholding the challenged regulations. *National Mining Association v. Chao*, __ F. Supp. 2d __, 2001 WL 915234 (D.D.C. Aug. 9, 2001).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The specific issues listed when the case was transmitted were:

1. Length of coal mine employment;[5]

2. Whether Claimant suffers from pneumoconiosis;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether Claimant's total disability is due to pneumoconiosis;[6] and

5. Whether Claimant's employment with the Southern Iowa Railway is covered coal mine employment under the Act and its regulations.

(DX 21.) The Director stipulated that Claimant did engage in covered coal mine employment for at least one year and nine months. (Tr. 8.) At the informal conference, the parties stipulated that the claim

[5] Incorporated in this issue is the subissue of whether Claimant's employment with Southern Iowa Railway was covered coal mine employment, which was listed as an additional issue on the transmittal form, Form CM-1025 (DX 21.)

[6] Total disability was essentially conceded by the Acting District Director at the informal conference and it was not listed as an issue when the case was transmitted. (DX 21.) Causation of total disability is, however, being contested.

was timely filed, that the Claimant was a miner within the meaning of the Act, and that his wife, Arlene, was an eligible dependent. (DX 19.)

Background and Employment History

Claimant set forth on his claim form that he was born July 15, 1923 and has been married to his wife, Grace Arlene, since 1944. (DX 1.) Claimant reported that he last worked in the coal industry in August 1964 and claimed a total of 16 years of coal mine employment.[7] (DX 1.)

On an employment history form (CM-911a), Claimant reported that he worked for Southern Iowa Railway (hereafter "SIRR"), owned by Iowa Southern Utilities Company, Centerville, Iowa (hereafter "ISU"), from 1948 to 1964, in the transportation of coal daily to the power company. (DX 2, 3.)[8] Claimant's employment by the railroad is confirmed by certificates of service from the U.S. Railroad Retirement Board and Social Security records. (DX 5.) Claimant reported on Form CM-913 that his job title was "Switchman, weighing all coal, set all empties at mine, pull all loads, etc." and he explained (in his own handwriting):

> My job was to keep Railroad cars to be loaded up to hoppers which filled them with steam coal for Power plant. Then pick up loads to be taken the[n] the scales & weighed, then on in to Power Plant. Again picking up empties to take back out to be reloaded. Certain days (quite often on Sunday morning) we loaded the cinders from a large cinder bin to be hauled out & disposed of. This was a very dirty Job & gas & fumes to contend with. We also filled cars with stoker coal, lump coal & the very fines we called (Bug Dust) which was used in local Pillsbury Plant at that time.

(DX 3.) At the hearing, Claimant read the text into the record with minor differences. (Tr. 37-38.) While Claimant's claim forms are silent as to why he left the coal mine industry, he testified that he was forced to retire when the mines closed in the mid-1960's. (Tr. 20.) Upon leaving the coal mine industry, Claimant worked as a self-employed farmer until February 1998. (DX 3; *see also* Tr. 3-35.)

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[7] Subsequently, Claimant alleged 18 years, after including work for a trucking company, as discussed below. (Tr. 9, Joint Pre-Hearing Submission.)

[8] Claimant's counsel indicated that Claimant was employed by SIRR from 1948 until 1964 "as a switchman for trains loading coal at Sunshine No. 3 and later Sunshine No. 4"; that Sunshine Coal Company, which owned the mines, was owned by ISU Power Company, which also owned SIRR; that the trains transported the coal to the scale for weighing; and that after being weighed, some of the coal was transported to the power plant. (DX 15, 18.)

Although not reported on the coal mine employment history forms, Claimant's attorney indicated that after his discharge from the Marine Corps on August 24, 1946, Claimant was employed by J.H. Foster Company transporting coal by truck from mines; that he was employed at Sunshine No. 3, a mine operated by Sunshine Coal Company that was just west of Centerville, Iowa, in 1946 and 1947; and that Claimant's job was "to load coal at the mine into the truck and then deliver the coal by truck." (DX 15-17.) The Social Security records reflect wages from Jacob H. Foster Jr. in the last quarter of 1944 and the first quarter of 1945 and show that in 1947 and 1948 the Claimant was employed by Ted R. Streepy of Centerville. (DX 6.) Because there is a Streepy Mine in Centerville, the Acting District Director credited the Claimant with one year and six months of coal mine employment based upon Claimant's work for Ted R. Streepy, and he also credited the Claimant with three months of coal mine employment based upon his two quarters of work with Jacob H. Foster, Jr. "because he stated that he spent about half of his time loading coal and the other half delivering it." (DX 19). Based upon these two periods of employment, the Director stipulated to one year and nine months of qualifying coal mine employment. (Tr. 8.) The Director has, however, contested that any of Claimant's employment with the railroad constituted coal mine employment. (DX 19.)

At the hearing, Claimant testified that after he left the Marines in August 1946, he went to work for J.H. Foster at Sunshine Number 3, and his work involved loading trucks with "[a]ll kinds of coal, bug dust they called it, like – ground up like flour, up to heavier size coal." (Tr. 15.) He breathed coal dust constantly while so employed. (Tr. 15-16.) While doing work for Mr. Foster, Claimant primarily loaded trucks with coal, although some of his time was spent delivering it as well.[9] (Tr. 14-18, 27-28.) With respect to his employment with the railroad, Claimant testified that he started as a brakeman, in which capacity he was employed for five years, watching for traffic and directing the driver when to switch tracks; as business decreased, he ended up as Conductor and did his own braking. (Tr. 29-30.) The cars were loaded with coal that was "pretty much" processed from hoppers, and Claimant moved them when they got full. (Tr. 30-33.) The coal was weighed at a site about three miles from the mine,

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[9] According to the Social Security records, the Claimant was employed by Ted R. Streepy for four quarters in 1947 and three quarters in 1948, when he claimed to have been employed by Mr. Foster at Sunshine. (DX 6; Tr. 18, 28; *see also* Joint Pre-Hearing Submission (Oct. 25, 2000).) The Social Security records only show two quarters of employment with Jacob H. Foster, Jr. (DX 6.) While the District Director credited Claimant with coal mine employment for the time spent with Mr. Streepy and it is included in the length of employment stipulation, testimony revealed that Claimant worked for Mr. Streepy for only one month and that the work consisted of mowing on the highway for the Iowa State Highway Commission. (DX 6; Tr. 18, 28.) Claimant testified that he was not involved with the mine at Streepyville, but he did not explain the discrepancy in the dates of employment. (Tr. 28.) Coal mine employment for at least one and three quarters years has been conceded under the Stipulation mentioned above, based upon the apparent assumption that Claimant worked at the Streepy Mine. (Joint Pre-Hearing Submission (Oct. 25, 2000); *see also* Director's Post Hearing Brief at p. 3 to 4.) However, inasmuch as the mowing work only lasted one month and Claimant testified that he was employed at Sunshine in hauling coal during the period of time that he supposedly worked for Mr. Streepy, I find no reason to set aside the Stipulation by the Director.

and then it was taken to the power plant, which was two miles further. (Tr. 30, 33.) It was also his job to bring back the empty cars to the coal mine. (Tr. 38.) Essentially, his job was to go in a big circle from the mine to the plant, and back again, although he would often have to wait for the loads. (Tr. 38.) On cross examination, Claimant agreed that the coal was "processed, always." (Tr. 38.) However, on redirect, he indicated that all he meant by "processed" was that the coal had already been ground. (Tr. 41.) On recross, he testified that coal coming from the tipple was not processed, and he was not aware that a tipple was used to clean coal. (Tr. 42-44.) Although he testified that the coal was not washed (except for stoker coal, which was treated with oil), he indicated that the coal was used by the power plant in the form in which it came from the mines. (Tr. 43-44.) Claimant testified that he was a lifelong resident of Appanoose County, Iowa, and that the mines closed in the county (except for a small pony mine) about the time that his service ended in 1965. (Tr. 14.) Today, Claimant is retired, uses an oxygen machine to assist his breathing, and is greatly limited in his physical activities. (Tr. 23-25, 35, 39-40.)

Medical History

Claimant has not had many major medical procedures or ailments according to the record. Prior to 1999, surgery was done on Claimant's right knee and he also had a hernia repaired. (DX 9.) Claimant reported that he suffered from sleep apnea and has a history of wheezing (since 1994) and arthritis (since 1989). (DX 9.) When Dr. Stephen S. Jewett examined Claimant on July 9, 1999, Claimant reported that he presently suffered from daily sputum and wheezing, dyspnea, coughing fits, and orthopnea, as well as sleep apnea and shortness of breath. (DX 9; *see also* Tr. 39.) Claimant testified that he began to have breathing problems about five years after he was discharged from the Marines, while working in the coal industry. (Tr. 21-22.) He testified that while working on the trains, he would "spit up black all the time, constantly black." (Tr. 22.) However, Claimant did not seek much medical treatment for his problems while he was working; instead, he just worked through them. (Tr. 21-22.) Claimant did visit a doctor when he was in his fifties, Dr. Edwards, who is now deceased, but overall, he stated that he really "didn't see a doctor very much." (Tr. at 22.) Claimant's family medical history includes diabetes, cancer, and emphysema, and Claimant reported that he had begun smoking approximately fifty to fifty-five years ago, but has since quit. (DX 9; CX A; Tr. 35-36.) While the quitting date is unclear (although it appears to be in 1998), Claimant testified that he stopped smoking around age seventy and that he was not a "heavy smoker" overall. (Tr. 35-36; CX A.) As mentioned above, Claimant is currently on oxygen when awake and while sleeping and takes several other antibiotics and medications. (Tr. 23-24, 39-40.)

Medical Evidence

1. **Chest Roentgenograms (X-Rays):** The record includes evidence of one chest x-ray (taken on July 9, 1999 in connection with Claimant's Department of Labor examination), which was read a total of three times by two different readers. Dr. Mary Christensen made the initial reading on the same date the x-ray was taken. Dr. Christensen is not a B-reader

and there is no indication in the record whether she is a Board-certified radiologist. She graded the film quality as "1" and did not find it to be completely negative; however, she did not detect any parenchymal or pleural abnormalities consistent with pneumoconiosis. Dr. Christensen noted the presence of emphysema and, in an attached report to her x-ray reading, diagnosed Claimant with advanced COPD [chronic obstructive pulmonary disease]. She also noted hyperinflation but no pleural thickening. Finally, Dr. Christensen detected small granulomas in Claimant's left upper and lower lobes. (DX 11.)

Dr. Leslie Preger was the other doctor to read this x-ray. A Board-certified radiologist and B-reader, she made two readings on the same day. On one, she graded the film quality as "2" (changed from "1"); on the other, she did not mark the grade. In both instances, she did not read the film as completely negative, but did not find any parenchymal or pleural abnormalities consistent with pneumoconiosis. Dr. Preger also noted the presence of emphysema on both reports and made the following observations: (1) Prominent central pulmonary artifices and pulmonary arterial hypertension; (2) Multiple old calcified granulomata; (3) COPD; and (4) ankylosing hyperostosis. The same comments appear on each of her readings. (DX 12.)

2. **Pulmonary Function Studies:** The record contains the results of two pulmonary function studies, dated July 9, 1999 and September 9, 1998. The most recent study produced an FEV_1 value of 0.90, an MVV value of 29.35, and an FVC value of 1.91 prior to use of a bronchodilator and an FEV_1 value of 1.00, an MVV value of 33.39, and an FVC value of 2.09 after. The test was administered by Dr. Stephen S. Jewett on July 9, 1999 and he noted that Claimant's cooperation and understanding were good. The FEV_1 and MVV results are qualifying under the Act for a seventy-one year old male who is sixty-six inches tall.[10] (DX 7.) The earlier study, dated September 9, 1998, produced the following readings: an FEV_1 value of 0.58 and an FVC value of 1.27 (also qualifying values); the MVV was not reported. (CX C.)

3. **Arterial Blood-Gas Studies:** There is only one complete arterial blood-gas test (ABG) report in the record, for ABGs taken on July 9, 1999 in connection with Dr. Jewett's examination. The resting results are a $_pCO_2$ value of 44.5 and a $_pO_2$ of 61; the post-exercise values are 42 for the $_pCO_2$ and 76 for the $_pO_2$. The test was conducted below 3000 feet and the results are not qualifying for either set of values. (DX 10.) However, it should be noted that the Claimant was on oxygen when these readings were taken. In

[10] The tables contained in Appendix B of Title 20, Part 718 of the Code of Federal Regulations only list results for men age seventy-one and younger. At the time of this test, Claimant was seventy-five years old and, thus, standards for his age are not included in the appendix. However, Claimant's results are so much lower than the listed qualifying standards that his measurements most likely would qualify for that of a seventy-five year old man.

addition, ABGs that produced qualifying values were referenced in 1998 reports by Dr. John Glazier, Dr. Angela Collins, and Dr. Gregory Hicklin, as discussed below.

4. Medical Opinions:

a. Dr. Stephen S. Jewett submitted a medical opinion in conjunction with his July 9, 1999 examination of Claimant for the Department of Labor. Dr. Jewett based his opinion on a chest x-ray (revealing COPD), a pulmonary function study (revealing moderate obstructive disease), a blood-gas test (ABG), and an EKG, which showed normal sinus rhythm with questionable septal infarct, as well as a physical examination. Dr. Jewett diagnosed Claimant with COPD and emphysema, basing this on Claimant's medical history, the x-ray, and the pulmonary function study. Under the etiology sections, Dr. Jewett wrote that a long strong history of smoking and farming superceded Claimant's coal dust exposure. Finally, as a result of the diagnosis, Dr. Jewett stated that Claimant could not return to any form of coal mine employment due to his severe impairment. (DX 9.)

b. Dr. John Glazier, a pulmonary disease specialist at the Iowa Lung Clinic, wrote two reports. In a letter dated September 20, 1999, Dr. Glazier stated the following: "[Claimant] is a patient we have evaluated in our clinic. He has severe [COPD]. He has a 16-year history of working in the coal industry exposed to coal dust. Your attention to this matter would be appreciated." (DX 18; CX D.) Previously, Dr. Glazier wrote a more detailed letter after examining Claimant. The letter, dated May 14, 1998, stated that Claimant did not appear to be in any "acute distress" but noted Claimant's breathing difficulties. Dr. Glazier concluded that Claimant suffered from severe COPD with hypoxemia and based this a qualifying blood-gas test (49 for the $_{p}CO_2$ and 48 for the $_{p}O_2$), a pulmonary function study, and a chest x-ray. (CX A.)

c. Dr. Kathleen A. Lange diagnosed Claimant with pneumoconiosis by letter dated October 19, 1999 (as discussed *infra*). She based this on his employment history and stated that he is totally disabled as a result of his condition. (DX 18; CX E.)

d. Dr. Sandra N. Mohr, the Department of Labor consultant, stated that Claimant does suffer from severe COPD, but not coal workers' pneumoconiosis. It appears that she intended to include both clinical and legal pneumoconiosis in that statement. She based her diagnosis on the July 1999 tests and Claimant's 1.75 years of coal mine employment and additional smoking and farming history. Dr. Mohr did opine that, if found to have worked in the coal mine industry for 17.75 years, his coal dust exposure could have a significant contributing effect to his condition. Dr. Mohr concluded by stating that Claimant is totally disabled from coal mine employment due to his age and COPD with chronic bronchitis, but not due to coal workers' pneumoconiosis. Dr.

Mohr is an assistant professor of occupational and environmental medicine, possesses a specialty in internal medicine, and wrote her report on October 10, 2000. (DX 22.)

e. Dr. Angela S. Collins submitted a medical opinion, dated May 27, 1998. She saw Claimant for a follow-up of his COPD when he was hospitalized for overnight observation due to difficulty breathing. Dr. Collins noted that Claimant's chest x-ray was unchanged from an earlier one and was consistent with COPD. She also reported qualifying blood-gas tests (54 for the $_pCO_2$ and 60 for the $_pO_2$). Dr. Collins concluded that Claimant has severe COPD and hypoxemia, which she attributed to his "severe emphysema." (CX B.)

f. Dr. Gregory A. Hicklin also wrote a medical opinion, which is dated September 10, 1998. Dr. Hicklin examined Claimant in follow-up to discuss his COPD. He noted that Claimant was not wearing his oxygen more than eight hours per day. Dr. Hicklin reported a blood-gas test with the following (qualifying) readings: 54 for the $_pCO_2$ and 55 for the $_pO_2$. After a physical exam and a spirometry, he diagnosed Claimant with "very severe chronic obstructive lung disease," as well as obstructive sleep disorder and hypoxemia. (CX C.)

DISCUSSION

Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis. 20 C.F.R. § 718.1(a) (2001). "Pneumoconiosis," commonly known as "black lung disease," is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a) (2001). The definition has been modified to expressly include "both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." [11] *Id.* In addition to establishing the existence of pneumoconiosis, Claimant must prove that (1) the pneumoconiosis arose out of coal mine employment; (2) he or she is totally disabled, as defined in section 718.204; and (3) the total disability is due to pneumoconiosis. 20 C.F.R. §§ 718.202-204 (2001).

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Court invalidated the "true doubt" rule, which gave

[11] The comments comprehensively explain why the new terms were inserted into the definition. *See* 65 Fed. Reg. 79,920, 79,937-45 (Dec. 20, 2000). It is suffice to say that the new definition was adopted in an effort to "conform it to the terminology uniformly adopted by the courts to distinguish between the two forms of lung disease compensable under the statute." *Id.* at 79,937. All chronic pulmonary diseases are formally recognized as compensable under the Act if related to or aggravated by coal mine dust exposure.

the benefit of the doubt to claimants. In order to prevail in a black lung case, the claimant must now establish each element by a preponderance of the evidence.

Miner Status and Coal Mine Employment

As noted above, the parties agree that Claimant did engage in covered coal mine employment for one-and-three-quarters years. However, there is an issue as to whether any or all of Claimant's employment with SIRR also qualifies as "coal mine employment" under the Act. The Act defines a miner as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal" and "also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment"; the regulations are similar. 30 U.S.C. § 902(d). *See also* 20 C.F.R. § 725.101(a)(19). As amended, the regulations also provide:

> A "miner" . . . is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. . .

20 C.F.R. § 725.202(a) (2001). Included among the regulations' most recent amendments are provisions specifically addressing the status of transportation workers. In pertinent part, the amended regulation states that:

> A coal mine . . . transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. **A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal. . . .** [Emphasis added].

Id. § 725.202(b). There is a rebuttable presumption that such workers are exposed to coal mine dust during such employment.[12] *Id.* Finally, the amended regulation defines "Coal preparation" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of [coal], and such

[12] Transportation workers must prove that they are miners under the Act before being entitled to invocation of the presumption regarding exposure to coal dust during such employment, found at 20 C.F.R. § 725.202(a) (1999) (as revised § 725.202(b) (2001)). *Ray v. Williamson Shaft Contracting Co.*, 14 B.L.R. 1-105 (1990) (*en banc*); *Garrett v. Cowin & Co., Inc.*, 16 B.L.R. 1-77 (1990).

other work of preparing coal as is usually done by the operator of a coal mine." 20 C.F.R. § 725.101(a)(13). *See also* 30 U.S.C. § 802(i) (from definition section of Federal Coal Mine Safety and Health Act (the "Mine Act"); the Black Lung Benefits Act appears at title IV of the Mine Act.)

A claimant bears the burden of establishing eligibility under the Act and the length of his or her coal mine employment under a preponderance of the evidence standard. *Barnes v. ICO Corp.*, 31 F.3d 678 (8th Cir. 1994); 20 C.F.R. § 725.103 (2001). Thus, the threshold question before me is whether or not Claimant, while performing his duties for SIRR, was a "miner" according to the definitions of the Act, with the burden of proof lying with him. When undertaking this analysis, one must keep in mind that Congress intended for the Act to be "liberally construed in favor of the miners to ensure compensation." *Bozwich v. Mathews*, 558 F.2d 475, 479 (8th Cir. 1977) (quoting and discussing legislative history).[13] While *Bozwich* appears to be limited to issues regarding medical causation, the legislative history of the 1977 Amendments indicates that other provisions and definitions were meant to be interpreted liberally. S. REP. NO. 181, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414 ("The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [*sic*] interpretations, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.") Nevertheless, limits to the extent of coverage afforded by the Act have been recognized by the Benefits Review Board (hereafter "Board") and courts alike. *See, e.g.*, *Stroh v. Director, OWCP*, 810 F.2d 61, 63 (3rd Cir. 1987) (noting that while remedial legislation should be interpreted broadly, transportation employees are beyond the scope of coverage when their "hauling activities involve coal that is already injected into the stream of commerce," *i.e.* processed coal).[14]

In *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985), the Board established a three prong test to determine whether a worker is a "miner" within the meaning of the Act. Under *Whisman*, the worker must prove that: (1) the coal was still in the course of being processed and was not yet a finished product in the stream of commerce (status); (2) the worker performed a function integral to the coal production process, *i.e.*, extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (function); and (3) the work that was performed occurred in or

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[13] The *Bozwich* court was not addressing whether the individual in question qualified as a "miner" or not. Rather, the court was addressing the weighing of evidence when a claimant has established medical causation and/or total disability and determined that when weighing medical records, the claimant should receive the benefit of the doubt. 558 F.2d at 479. *But see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (invalidating "true doubt" rule.)

[14] While the Third Circuit found the appellant in *Stroh* to be covered by the Act, they focused primarily on the fact that he hauled raw, not processed, coal to a processing plant. 810 F.2d at 63-64. By contrast, Claimant only hauled processed coal to a power plant.

around a coal mine or coal preparation facility (situs).[15] *Id.* at 1-96. It is important to note that the Eighth Circuit has not addressed this issue and, thus, all three prongs of the *Whisman* test must be met.[16]

The focus of inquiry of the first prong is the status of the coal itself. Thus, to prevail, a "claimant must prove that the coal with which he worked was still in the course of being processed, and not yet a finished product in the stream of commerce." *Whisman*, 8 B.L.R. at 1-97. The first prong focuses on whether the coal was "raw coal" or "processed coal."

Related to this prong is the function prong, where the pertinent inquiry is whether or not the work a claimant performs is essential to the extraction and preparation of coal.[17] *See Ray v. Williamson Shaft Contracting Co.*, 14 B.L.R. 1-105 (1990) (citing *Fagg v. Amax Coal Co.*, 865 F.2d 916 (7th Cir. 1989)). *See also Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38, 41 (4th Cir. 1991) (crushing and loading of prepared coal by river man at dock house does not qualify as coal mine employment as the coal was already in the stream of commerce); *Dowd v. Director, OWCP*, 846 F.2d 193, 195 (3rd Cir. 1988) (bagger at facility which dried, ground and bagged unprocessed coal for resale qualifies as a miner, as coal was being prepared and not manufactured into a product); *Eplion v. Director, OWCP*, 794 F.2d 935 (4th Cir. 1986) (worker who assisted in loading prepared coal from railroad cars onto barges not a miner, even though the facility performed additional washing of the coal after the coal was processed and prepared for market); *Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984) (unloading prepared coal from railroad cars to trucks or storage piles and delivery of coal to consumers is not coal mine employment); *Cook v. Director, OWCP*, 17

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[15] While the Board has noted that the general *Whisman* approach has been followed by the circuit courts, a number of courts only require the situs and function prongs to be met, with the status prong incorporated into the function prong. *Ray v. Williamson Shaft Contracting Co.*, 14 B.L.R. 1-105 (citations omitted). Circuits courts that have adopted the two-prong approach are the Third, Fourth, Sixth, Seventh, and Eleventh Circuits. *See Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3d Cir. 1994); *Director, OWCP v. Consolidation Coal Co.*, 884 F.2d 485 (6th Cir. 1988); *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988); *Eplion v. Director, OWCP*, 794 F.2d 935 (4th Cir. 1986); *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986). Importantly, the Eighth Circuit has not accepted or rejected the *Whisman* test.

[16] In *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983), the Eighth Circuit did address, as an ancillary issue, whether a blacksmith would qualify as a miner under the Act and found that he would not, unless his specific job constituted mining or coal preparation or had some connection to a coal mine. However, the Eighth Circuit simply relied on the statutory definition and agreed that the blacksmith's employment fell outside the definition. *Id.* at 444-45.

[17] As discussed above, some circuit courts combine the function and status prongs. *See, supra*, n.15. While these courts do not make an independent inquiry into the status of the coal, it is addressed in the context of the function prong..

B.L.R. 1-90 (1993) (work by railway worker in yard of coke plant using raw coal was first step in manufacturing process and not coal mine employment). It must therefore be determined "whether the particular activities assist in functions that are actually part of coal production, and therefore, covered by the Act, or whether the activities are ancillary instead to the commercial delivery and use of the processed coal." *Swinney v. Director, OWCP*, 7 B.L.R. 1-524, 1-526 (1984). The Sixth Circuit has explained: "Although workers performing duties incidental to the extraction or preparation of coal have met the function requirement and have been considered to be coal miners, these incidental duties must be an 'integral' or 'necessary' part of the coal mining process." *Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989) (night watchman found not to qualify as miner). Thus, coal mine employment generally extends to work done up until the time when the coal has been processed and loaded for further shipment. When the coal has been extracted and prepared, and is ready for delivery to retail distributers and consumers, the work may be deemed ancillary to the shipment of finished coal.

After reviewing the documentary evidence and hearing testimony, I find that Claimant has not sufficiently proven that the coal he worked with was unprocessed. Thus, he fails the status prong of the *Whisman* test.

While Claimant did testify as to what his responsibilities were while employed by SIRR, his testimony does not clearly explain what exactly occurred at the loading site. While at SIRR, Claimant testified that he would take train cars filled with coal to the "scale house" (weigh station) and then to the power plant. (Tr. 17-18.) If the car was not yet filled, he would remain at the loading area and "spot" the car until it was full. (Tr. 18-19.) Claimant said that he would help with the loading of both coal and cinders, which is burnt coal.[18] On cross-examination, Claimant stated that for his entire length of employment with SIRR, he worked as a railroad brakeman, and later, when business began to slow down, as a railroad conductor. (Tr. 29.) In both instances, Claimant was responsible for directing the train and switching the tracks so that they could travel to the weigh station and then to the power plant; later on he was involved with the weighing of the coal as it was loaded (although he did not physically load the coal onto the train cars); and he also brought the empty cars back to be reloaded. (Tr. 30-32, 37-38.) Claimant stated initially that the coal was already processed and had gone through the tipple before it was loaded. (Tr. 32-33, 38.) However, on redirect and recross examinations, Claimant explained that what he meant by processed was that the coal was ground into different sizes before it was loaded and it became clear that Claimant was not sure what the tipple was, although he said that the machinery that the coal went on was part of the processing equipment. (Tr. 41, 43.) Finally,

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[18] In *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), the court addressed a benefits claim by an individual who delivered coal to a power plant. In upholding the Board's decision to deny benefits based on failure to meet the function prong, the court noted that "[t]he plant received only coal dust, indicating that the raw coal . . . had been sifted and sorted prior to delivery." *Id*. at 571. The coal delivered in *Foreman* appears to be similar to some of that in the case at hand, further indicating that the coal Claimant transported was processed coal. *See also Johnson v. Weinberger*, 389 F. Supp. 1296 (S.D.W.V. 1974) (chemical plant employee who unloaded "bug dust" from trains was not a miner.)

Claimant testified that while the coal was not washed when it was loaded, the power plant did not have to further process the coal when the plant received it, and it was ready for immediate use. (Tr. 44.)

The record contains several letters from Claimant's attorney (Mr. George Appleby) that try to more definitively explain Claimant's duties with SIRR.[19] In his first letter, Mr. Appleby states that his client was "a switchman for the trains loading coal" primarily at two different mines. (DX 15.) There is no indication whether or not this was finished or raw coal. Mr. Appleby later expanded on this description, stating that Claimant told him that he "worked as a switchman on trains transporting the coal to a processing plant, from which the coal would then be transported to its destination market" and that the coal still needed additional processing before it was released for sale. (DX 16.) Mr. Appleby's statements concerning transportation to a processing plant are not supported by Claimant's testimony or written submissions, which only mention that the coal was being transported to a weigh station prior to the power plant. (*See also* DX 18 (reporting that the trains Claimant worked on were responsible for transporting the coal to a scale for weighing and then some of the coal was then sent to the power plant).)

After considering Claimant's testimony and submissions in their entirety, I find that he has failed to prove that the coal loaded onto his train cars was raw or unprocessed. Indeed, his testimony indicates that more likely than not the coal was already processed, as it was already crushed into different sizes and at least one type of coal was treated with oil. (Tr. 44 (discussing "stoker" coal).) Further, the power plant was able to use the coal immediately upon delivery and, even though the coal was routed through a weigh station, nothing indicates that is was further processed or refined while there.[20] In sum, I find that Claimant has not met his burden of proof regarding the type of coal he worked with, *i.e.* he has not proved that the coal loaded onto the train cars he worked on was unprocessed, or raw, coal. Thus, he cannot satisfy the status prong and cannot prove that his work for SIRR was employment covered by the Act.

Furthermore, I find that he has also failed to sufficiently prove the function prong, as his activities appear to be more related to the delivery of processed coal to consumers rather than the production of coal for transportation. However, I note that this is a much more difficult determination, as some circuits have held that activities similar to Claimant's do qualify under the Act. Historically, the Board has designated the tipple as the traditional "demarcation point between the mining and marketing

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[19] These statements by counsel are hearsay to the extent that they set forth Claimant's assertions and history, and they are not evidentiary in nature.

[20] Although Claimant has argued that the "weighing" of coal is a part of coal processing, it is not specifically included in the definition of coal preparation (quoted above) and Claimant has produced no evidence showing that it is "other work of preparing coal" "usually done by the operator of a mine." *See* 20 C.F.R. § 725.101(a)(13). *See also Johnson v. Jeddo Highland Coal Co.,* 12 B.L.R. 1-53 (1988) (shipping clerk and weighmaster of processed coal found not to be a miner).

of coal," and some circuits, including the Fourth Circuit, have followed suit. *See, e.g., Collins v. Director, OWCP*, 795 F.2d 368, 372 (4th Cir. 1986). *See also Spurlin v. Director, OWCP*, 956 F.2d 163, 164 (7th Cir. 1992) (acknowledging that the majority of circuits and the OWCP view the tipple as the traditional line of demarcation). Regarding transportation workers specifically, the Board has stated that they are miners for purposes of the Act if their activities are "integral to the coal production process." [21] *Swinney, supra* at 1-528. *Compare* 20 C.F.R. § 725.202(b) (work must be "integral to the extraction or preparation of coal.") Consistent with this approach, time spent by railroad employees delivering empty coal cars and cars containing raw coal to coal preparation facilities has been found to be integral to the coal preparation process. *See Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 1150 (4th Cir. 1990), *cert. denied***,** 500 U.S. 916 (1991); *Norfolk & Western Railway Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777 (4th Cir. 1993). Maintenance of railroad lines out of a mine has also been found to qualify as coal mine employment. *See Freeman v. Califano*, 600 F.2d 1057 (5th Cir. 1979). However, a railroad employee who repaired tracks used to transport processed coal was not found to be a miner. *Blevins v. Louisville & Nashville Railroad Co.*, 13 B.L.R. 1-69 (1988).

The facts before me indicate that Claimant was only receiving and delivering processed coal, and that the work he performed was not "integral to the extraction or preparation of coal", as required under 20 C.F.R. § 725.202(b) (2001). The coal that Claimant transported was already in the stream of commerce, and Claimant's work, which essentially consisted of picking up and delivering coal for a single end user (a power plant), was incidental to its commercial use by the plant. Moreover, as noted above, "weighing" is not among the listed activities of coal preparation, and Claimant has produced no

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[21] In reaching this general rule, the Board explained that

> The second approach we have considered to resolve this problem is derived from [Board decisions], and from those cases which have held that transportation and processing activities fall outside the coverage of the act once the coal is "in condition for delivery to distributors and consumers." *Southard v. Director, OWCP*, 732 F.2d 66, 69 (6th Cir. 1984); *see Johnson v. Weinberger*, 389 F. Supp. 1296 (S.D. W. Va. 1974); *cf. Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1984); *Tacket v. Director, OWCP*, 6 B.L.R. 1-839 (1984). Rather than mechanically applying statutory and regulatory definitions to each of the transportation worker's tasks in a vacuum, this second approach analyzes whether the particular activities assist in functions that are actually part of coal production and, therefore, covered by the Act, or whether the activities are ancillary instead to the commercial delivery and use of the processed coal.

Swinney, supra, at 1-527 to 1-528.

evidence that the function is one generally performed by mine operators as part of coal preparation.[22] Thus, Claimant's activities do not fall within the statutorily recognized activities contained in the definition of preparation and, thus, they are not covered.

There are two cases cited by the parties which tend to support Claimant's arguments.[23] Those cases are from the Third and Seventh Circuits, each of which applies a two-prong test.

In the first case, *Hanna v. Director, OWCP*, 860 F.2d 88 (3rd Cir. 1988), the Third Circuit found that a worker who "assisted in the loading of coal at the mine site onto coal barges" qualified for benefits under the Act. *Id.* at 89. Mr. Hanna was employed in various capacities on sternwheelers and tug boats that were loaded with coal as it was taken off the tipple. *Id.* at 89-90. Once loaded, the coal was then delivered to the customers of Mr. Hanna's employer, who owned both the mine itself and the shipping company. *Id.* at 89-90. His actual participation in the loading of the coal was limited to steadying the barges to ensure that the coal was actually loaded onto the boat and did not fall into the river. *Id.* at 90 n.1. The Director argued that Mr. Hanna failed to meet the function prong of the miner test, asserting that Mr. Hanna was not involved in the production of coal as the Act construes the phrase.[24] The Third Circuit disagreed, rejecting the tipple as a "bright line" and holding "we cannot agree that, under the facts of this case, the work that Hanna performed loading the coal at the mine site, constituted activity in the stream of commerce." *Id.* at 92. In reaching their decision in *Hanna*, the Third Circuit recognized that the line of demarcation between covered and non-covered activity was a

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[22] See footnote 20 *supra.*

[23] Claimant also relies on the lower court decision in *Herman v. Associated Electric Coop., Inc.*, 994 F. Supp. 1147 (E.D. Mo. 1998), *rev'd* 172 F.3d 1078 (8th Cir. 1999), a case involving mine inspections under the Federal Mine Safety and Health Act ("Mine Act"). While Claimant includes a quote from the *Herman* district court decision in his brief, the court was actually quoting *United Energy Services, Inc. v. MSHA*, 35 F.3d 971 (4th Cir. 1994), a case which addressed the scope of the Mine Act in regard to a power plant that consumed coal mined at an adjacent mine and transported to the plant via a conveyor belt, but only after sorting on a conveyor belt. *Id.* at 973. The Fourth Circuit held that, since the coal underwent further processing, the power plant was a mine under the Mine Act. *Id.* at 975. ("Although delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act, United Energy's activities occur a step earlier in the overall process. They involve the transportation of coal to the preparation facility and thus are part of the 'work of preparing coal.'") In the instant case, there has been no showing that the power plant processed the coal delivered by Claimant. Moreover, the Eighth Circuit implicitly rejected the Fourth Circuit's approach when overturning the district court's decision and finding that the electric utility operating the plant was not a mine under the Mine Act.

[24] The Director relied, in part, on *Stroh v. Director, OWCP*, 810 F.2d 61 (3d Cir. 1987), where the Third Circuit held that a self-employed trucker who loaded raw coal at a mine site and hauled it to a processing plant was a miner under the Act but observed that one who delivered finished coal to the ultimate consumer would not qualify; in the latter case, the worker would merely facilitate the introduction of the finished product into the stream of commerce. *Hanna, supra*, at 92-93.

difficult one to draw and was reluctant to simply adopt a bright line test, as other circuits had done. *Id.* (citing *Collins, supra.)*. The court wrote that, "[i]n our view, removal of the coal from the tipple is a 'necessary' part of the preparation of coal for transport into the stream of commerce" and concluded that since the coal needed to be loaded into something for transportation (here, a boat), Mr. Hanna's coordination of the boats for loading "was a necessary part of the 'work of preparing the coal' for delivery." *Id.* at 93 (citing *Mitchell v. Director, OWCP,* 855 F.2d 485 (7th Cir. 1988)..

In reaching this holding, the *Hanna* court noted that the definition of "miner" must be read in conjunction with the definition of preparation. After analyzing relevant case law and the facts of the case before them, the *Hanna* court concluded that

> Section 802(i) of the Act provides that the "loading" of coal is an act within the meaning of the term "preparation." Hanna's employment responsibilities included the "loading" of the coal, at the mine site, from the tipple onto the barges. We conclude that that work constituted participation in coal preparation and that, in this case, it was not until the coal was loaded onto the barges . . . that it [] entered into the stream of commerce. Accordingly, we hold that Hanna was a miner within the meaning of the Black Lung Act and that he is entitled to the benefits that the Act provides.

Hanna, 860 F.2d at 93.

The Seventh Circuit took a similar approach in the other case relied upon by Claimant, *Spurlin v. Director, OWCP*, 956 F.2d 163 (7th Cir. 1992). In that case, the Seventh Circuit held that a railroad conductor who "spotted" (parked) railroad cars that were loaded with coal at a mine was a miner within the meaning of the Act. Mr. Spurlin, much like Mr. Hanna and Claimant, did not physically load the coal onto the trains; rather, he would pick up empty cars and drive them past the tipple and up a hill, where they would be parked until they were needed. *Id.* at 163. Once needed, a coal mine employee would release the brakes of the car and it would ride down a hill to the tipple, where it would be loaded with coal. *Id.* at 163-64. Only then would Mr. Spurlin resume activity on the cars, as he then helped form them into trains for shipment to consumers.

Like the *Hanna* court, the *Spurlin* court focused on the statutory definitions of "miner" and "preparation" and where the appropriate line should be drawn. The court noted that, if taken literally, the statute would extend coverage to all railroad workers involved in the transportation of coal that were exposed to coal dust at any point in time and that it was "unlikely that the statute was meant to go so far." *Id.* at 164. The court then acknowledged the different approaches taken by the Board and circuit courts, including *Collins* (which accepted the tipple as the line of demarcation) and *Hanna*. *Id.*

Ultimately, the Seventh Circuit declined to affirmatively state which approach they would adopt,

as they instead analogized the situation before them to the scenario they encountered in *Mitchell*, where the worker's activities (cleaning railroad cars) occurred prior to loading the cars at the processing plant for shipment.[25] *Id.* The Seventh Circuit concluded that since Mr. Spurlin's activities occurred well before the cars were loaded, he engaged in work that constituted an "essential step in the preparation of the coal for delivery." *Id.* However, the court recognized the fact that, potentially, everything beginning with the construction and servicing of the railroad cars could be construed as an essential step in the production of coal for delivery and noted that the transportation needed to be "in or around the coal mine" according to the Act. *Id.* The court emphasized the importance of the fact that Mr. Spurlin's work required him to drive the cars past the tipple, as well as near it, and felt that if all he was doing was delivering the cars to "a point near the tipple" and then left, "there would be a question whether he was working in or around the mine." *Id.* But, since this was not the situation before them, the court left this scenario unaddressed.

The approach crafted by the *Hanna* court and cited in *Spurlin* appears to go beyond that contemplated by the Board, in that this approach seemingly extends coverage to individuals who are never exposed to raw coal. Indeed, neither Mr. Hanna nor Mr. Spurlin were ever exposed to raw coal. Yet, each qualified for benefits in the eyes of the court. As mentioned above, the Board has taken the position that transportation activities involving processed coal are not covered by the Act; such coal is deemed to be within the stream of commerce. According to the Board, the general rule is that coal is considered fully processed once it leaves the tipple, which would mean that any activity with this coal would not be covered and cannot meet the function prong. As the Eighth Circuit has not directly addressed this issue, I am bound to follow the Board's approach.

The instant case is similar to *Hanna* in that the Claimant has asserted that the mine owned the power plant which, in turn, owned the railroad that he worked on, and he performed a "spotting" function when the coal was loaded. It is also similar to *Spurlin*, in that the empty trains he brought to the mine were loaded with coal at the mine and the "spotting" function he performed during the loading process could be deemed to be part of coal preparation. However, even applying the principles from those cases, I find that the incidental functions performed by Claimant in the instant case were not

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[25] In *Mitchell*, a Seventh Circuit case, the worker was responsible for cleaning the rail cars prior to the loading of the coal. 855 F.2d at 486. The court concluded that Mr. Mitchell's employment fell within the coverage of the Act, as it "related to the preparation of coal for delivery, not to the delivery of a finished product to consumers in the stream of commerce." *Id.* at 490. In making its determination, the court noted that Mr. Mitchell worked under the direction of the mine employees and the purpose of the work was to help prepare the cars so that they could be used to transport coal from the processing plant. *Id.* The court stressed the fact that Mr. Mitchell "was not involved in the distribution of coal that had been fully processed," as the cars he cleaned were taken to a preparation facility, not consumers. *Id.* This case is distinguishable because the activities in question occurred ancillary to work at the preparation plant in *Mitchell*, while it is a much finer line with Claimant's situation, as Claimant's transportation route covered a loop entirely outside of the mine and appears to have involved only fully processed coal.

"necessary" or "essential" to the preparation of coal. Here, Claimant's primary purpose was to pick up and deliver coal to a customer, not to perform a function integral to coal extraction or preparation, and the coal was already in the stream of commerce. Accordingly, I find that Claimant has failed to meet the function prong as well.

In view of the foregoing, I find that Claimant has failed to meet his burden of proof regarding the type of coal he worked with and, thus, he has failed to meet the status prong of the *Whisman* test. In addition, he has not met the function prong either. As such, I find it unnecessary to address the "situs" prong, for Claimant cannot succeed in proving that he is a miner if he cannot prove all three elements of the *Whisman* test.

Based upon the above, I find Claimant's total amount of covered coal mine employment to be one year and nine months, the amount previously stipulated to. Since Claimant does have some covered coal mine employment, I now move to the merits of the claim.

Existence of Pneumoconiosis

After a careful evaluation of the medical evidence submitted, I find that Claimant has not met his burden in establishing that he has pneumoconiosis. The existence of pneumoconiosis can be established in four ways. First, an x-ray of the claimant's chest can be used to prove the existence of the disease. 20 C.F.R. § 718.202(a)(1) (2001).[26] The x-ray must comply with the requirements set forth in section 718.102 and, in the case of multiple conflicting x-ray reports, the radiological qualifications of the interpreting physicians shall be considered. *Id.* Next, the disease can be established through a biopsy or autopsy (none of record), or through certain statutory presumptions which are inapplicable here.[27]

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[26] While the recent regulatory amendments governing the "standards for the administration of clinical tests and examinations" developed after January 19, 2001 are prospective only, those affecting the provisions regarding the determination of entitlements and statutory presumptions are retroactive. *See* 20 C.F.R. §§ 718.101(b), 725.2 (2001). I note here that none of the medical evidence was developed after January 19, 2001 and the Director has taken the position that, by virtue of section 718.101(b) (2001), the old standards apply to all of the medical evidence developed after January 19, 2001 (which would include all of the medical evidence in the record) and the new treating physician rule in section 718.104 (2001) is inapplicable to such evidence. *See* Director's Brief of March 29, 2001 at p.2 (citing 20 C.F.R. § 718.101(b) and 65 Fed. Reg. 79933).

[27] Claimant has not proven the disease's existence through a biopsy and cannot take advantage of the statutory presumptions, so subsections (2) and (3) of section 718.202(a) (2001) are inapplicable. Claimant has not submitted any biopsy reports and Claimant's medical evidence is insufficient to invoke the irrebuttable presumption found in section 718.304, as there is no evidence of the large opacities or massive lesions of complicated pneumoconiosis. Claimant cannot take advantage of section 718.305, as that section only applies to claims filed before January 1, 1982, or section 718.306, which only applies to death claims filed prior to June 30, 1982.

Id. § 718.202(a)(2)-(3). Finally, the disease can be established by the opinion of a physician using "sound medical judgment." *Id.* § 718.202(a)(4). All such opinions must be based on "objective medical evidence," which includes blood-gas studies, pulmonary function studies, work and medical histories, and physical examinations. *Id.* A claimant must prove the existence of pneumoconiosis by a preponderance of the evidence and evidence under all subsections must be weighed together. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

Upon examination of all the x-ray evidence in the record, Claimant has not met his burden of proof regarding the existence of the disease. None of the x-rays report any abnormalities consistent with pneumoconiosis. Thus, after carefully evaluating all of the x-rays, I find that Claimant has not proven by a preponderance of the evidence that he has clinical pneumoconiosis.[28]

Similarly, Claimant's medial opinion evidence does not sufficiently establish the existence of either clinical pneumoconiosis or legal pneumoconiosis.[29] There are a total of six physicians who have issued medical reports in the record. Among these, only one provides an unequivocal diagnosis of pneumoconiosis, and that is the October 19, 1999 opinion of Kathleen A. Lange, M.D. (CX E; DX 18). Specifically, Dr. Lange stated in her October 19, 1999 report that the Claimant "worked in a coal mine from 1946 - 48 where he worked in transportation breathing coal dust during his work time and returned home probably with coal dust at the day's end" and "[f]rom 1948 - 1964 he continued to work at the railroad which contributed to his condition which consists of pneumoconiosis." However, as noted below, Dr. Lange's opinion was very cursory and did not state the basis for her opinion. Accordingly, it does not appear to qualify as a "reasoned" medical opinion under section 718.202(a),

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[28] As amended, the regulations define "clinical pneumoconiosis" as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment" and specifically provides that the "definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. § 718.201(a)(1) (2001).

[29] The amended regulations provide: "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic respiratory or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2) (2001) (emphasis added). The regulations continue by stating that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.* at § 718.201(b) (emphasis added). Thus, a claimant who cannot prove clinical pneumoconiosis must be able to show that the miner suffers from legal pneumoconiosis and, further, that the miner's coal mine employment caused or aggravated his or her pulmonary condition to a significant extent. As will be shown *infra*, Claimant has failed to prove this causal connection between his lung disease and his coal mine employment.

and, to the extent that it may be deemed to be such, it is entitled to little weight due to its conclusory nature. (DX 18; CX D-E).[30] The only other opinion which could be interpreted as diagnosing pneumoconiosis arising out of coal mine employment is the October 10, 2000 opinion of Dr. Mohr. In that opinion, Dr. Mohr determined that the Claimant did not have coal workers pneumoconiosis as defined in the regulations, basing that finding upon 1.75 years of coal mine employment. However, she found that "[i]f the claimant were found to have 17.75 years of covered coal mine employment, particularly at the face or other dusty environments, in all likelihood the coal dust exposure could have been a significant contributor to his development of a chronic bronchitis type of coal workers' pneumoconiosis (albeit not the sole contributor)." As noted above, I have not found Claimant's qualifying coal mine employment to exceed one and three quarters years. Moreover, even if the 17.75 year history is used, notwithstanding the reference to "likelihood", Dr. Mohr's opinion is somewhat speculative and equivocal, as it also uses the term "could," and it appears to rely upon employment at the face or a comparably dusty location, when the bulk of Claimant's employment was in the vicinity of the railroad.

None of the other physicians expressing opinions diagnosed either clinical or legal pneumoconiosis, in that, although they diagnosed chronic obstructive pulmonary disease (COPD), they failed to identify Claimant's coal mine employment as the cause of the COPD, as discussed *infra*. Dr. Glazier's first opinion did not even mention the Claimant's coal mine employment. While the second opinion from Dr. Glazier noted that the Claimant "has severe chronic obstructive pulmonary disease" and that "he has a 16-year history of working in the coal industry exposed to coal dust," the opinion did not establish a causal relationship between the COPD and the coal dust exposure. At best, it is equivocal regarding etiology.[31] The opinion by Dr. Jewett mentioned the Claimant's coal mining employment but found that it was superceded by his smoking and farming as the etiology of Claimant's cardiopulmonary diagnoses. Drs. Collins and Hewitt diagnosed COPD but did not find it to be associated with Claimant's coal mine employment, so their diagnoses do not qualify as "legal pneumoconiosis." In light of all the medical opinion evidence presented, I find that Claimant has shown that he suffers from severe COPD, but he has not shown that it arose out of his coal mine employment.[32] Therefore, it does not satisfy the definition of "legal pneumoconiosis."

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[30] Dr. Lange's opinion, like some of the others, is also entitled to less weight because she considered an employment history of sixteen years, not one year and nine months as I have found. However, this matter is discussed *infra* on the issue of relationship of pneumoconiosis to coal mine employment.

[31] In *Wisdom v. Director, OWCP*, 7 B.L.R. 1-52 (1984), the Benefits Review Board held that, where a physician merely noted that the claimant worked in the mines for "some time," the necessary causal relationship was not established because the opinion was too equivocal and vague.

[32] Certain medical opinions allude to ABG test results. (CX B-C.) However, the actual tests are not of record and they relate to the extent of Claimant's disability as opposed to its etiology or diagnosis.

Looking at section 718.202(a) as a whole, I find that Claimant has not established clinical or legal pneumoconiosis under 20 C.F.R. § 718.202(a).

Relationship to Coal Mine Employment

Claimant has not established that his pneumoconiosis arose, in part, out of his coal mine employment. When pneumoconiosis has been established, there is a rebuttable presumption that the disease arose from coal mine employment if the miner can establish employment in one or more coal mines for at least ten years. 20 C.F.R. § 718.203(b) (2001). If the presumption is unavailable, the burden of proving the causal relationship between the disease and the coal mine employment falls on the claimant. *Id.*; *Fly v. Peabody Coal Co.*, 1 B.L.R. 1-713 (1978).

Here, Claimant is not entitled to the presumption, as he cannot prove more than the one year and nine months of coal mine work that was stipulated to. Moreover, while Claimant successfully showed that he does suffer from lung disease, he has not successfully proven that it was caused by his coal mine employment. In this regard, none of the physicians unequivocally stated that Claimant's covered coal mining employment caused or contributed to his pneumoconiosis. In this regard, Dr. Lange stated in her October 19, 1999 report that the Claimant "worked in a coal mine from 1946 - 48 where he worked in transportation breathing coal dust during his work time and returned home probably with coal dust at the day's end" and "[f]rom 1948 - 1964 he continued to work at the railroad which contributed to his condition which consists of pneumoconiosis." She provided no other discussion of the basis for her opinion, other than her conclusion that the Claimant should receive compensation because "[h]e is totally disabled from his condition at this present time." (DX 9.) As noted above, this report is too conclusory to be entitled to much weight, particularly as it is premised upon all of the Claimant's years of alleged coal mine employment, including that which is nonqualifying. More importantly, a careful reading of Dr. Lange's opinion indicates that it is dependent upon the Claimant's entire history of coal-related employment, including his employment with the railroad. As noted above, in his second report, Dr. Glazier simply noted that Claimant was exposed to dust while working in the coal industry but did not link Claimant's disease to his coal mine employment (DX 18.) By contrast, Dr. Glazier's first opinion, which is more detailed, did not mention any of Claimant's coal mine employment history. In it, he reported that Claimant told him that a physician from the University of Iowa diagnosed him as having emphysema and farmer's lung and the doctor also noted that Claimant stopped smoking earlier that year (1998) after approximately fifty years.[33] (CX A.) Based upon this

[33] While Claimant's statements to his physicians are hearsay, they fall within the ambit of a recognized hearsay exception (statements for medical diagnosis or treatment). *See* FED. R. EVID. 803(4); 29 C.F.R. § 18.803(4). Although an administrative law judge is not bound by formal rules of evidence when presiding over Black Lung cases (*see* 20 C.F.R. § 725.455(b)), and the rules of evidence relating to administrative hearings before the Office of Administrative Law Judges appearing in 29 C.F.R. Part 18, Subpart B are inapplicable to Black Lung cases (*see* 29 C.F.R. § 18.1101(b)(2)), I find them to be an exposition of sound evidentiary principles and look to them for guidance in resolving evidentiary issues.

history, along with several tests mentioned but not included in the record, Dr. Glazier concluded that Claimant suffers from severe COPD with hypoxemia. (CX A.) Dr. Jewett, who submitted the most comprehensive and reasoned report in the record, noted that "[a] long strong history of smoking and farming [] supercedes [Claimant's] history of coal dust exposure" in the etiology section of his report and he further noted that Claimant's employment history was a bit vague; thus, his opinion does not support a finding that Claimant's coal mine work was a contributing factor. (DX 9.) Dr. Mohr, who also issued a fairly detailed report, agreed that Claimant suffered from severe COPD, but did not attribute this to Claimant's "limited" coal mine employment; rather, she noted his more than fifty years of smoking and his farm work. (DX 22.) Similarly, Dr. Collins submitted a medical opinion in which she diagnosed severe COPD and hypoxemia, which she found attributable to severe emphysema, but she failed to associate these conditions with the Claimant's coal mine employment. Dr. Hicklin recorded the diagnosis of COPD and listed his impressions of very severe chronic obstructive lung disease, obstructive sleep apnea, and hypoxemia, but did not address the etiology of any of these conditions.

Thus, in light of all the evidence presented, Claimant has failed to meet his burden of proof as to this element and his claim must fail, as establishing a causal relationship between pneumoconiosis and coal mine employment is a necessary element of a claim for black lung benefits.

Conclusion

I find that since Claimant has not met his burden of proof regarding the existence of pneumoconiosis or the causal relationship between his lung disease and his coal mine employment, his claim must fail. In view of this determination, it is unnecessary to address the remaining issues before this tribunal.

ORDER

IT IS HEREBY ORDERED that the claim of Billy E. Carter for benefits under the Act is **DENIED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.